IN THE
MISSOURI SUPREME COURT

SCOTT D. BARMORE,	)	
	)	
Appellant,	)	No. SC85103
	)	
vs.	)	
	)	Transferred from
STATE OF MISSOURI,	)	ED80470
	)	
Respondent.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT
FROM THE CIRCUIT COURT FOR ST. CHARLES COUNTY,
ELEVENTH JUDICIAL CIRCUIT,
THE HONORABLE GRACE NICHOLS JUDGE AT PLEA AND
THE HONORABLE NANCY SCHNEIDER,
JUDGE AT SENTENCING AND POST-CONVICTION PROCEEDINGS

APPELLANT'S SUPPLEMENTAL BRIEF

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JURISDICTIONAL STATEMENT

The appellant Scott Barmore brought this appeal to challenge the denial of his motion for post-conviction relief under Rule 24.035, whereby he sought to vacate his convictions of robbery in the first degree and robbery in the second degree in the Circuit Court of St. Charles County. This Court granted appellant's Application to Transfer this appeal under Rule 83.03. This Court has jurisdiction to hear this appeal under Article V, Section 10 of the Missouri Constitution.

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The Record on Appeal will be cited to as follows: Post-conviction Legal File, "P.C.R.L.F.", Supplemental Plea Transcript, "Plea Tr." and Supplemental Sentencing Transcript, "Sent. Tr."

STATEMENT OF FACTS

On October 30, 1998, appellant Scott Barmore pled guilty in the Circuit Court of St. Charles County to the offenses of robbery in the first degree and robbery in the second degree, Cause No. CR198-1527FX, in violation of Sections 569.020 and 569.030 RSMo (P.C.R.L.F. 10, 11-20; Plea Tr. 7-11). Prior to the plea court accepting the plea, Mr. Barmore was advised that the range of punishment for the robbery in the first degree charge was from ten to thirty years imprisonment, and the range of punishment for the robbery in the second degree charge was five to fifteen years (Plea Tr. 5).

The prosecutor then advised the plea court that pursuant to a plea bargain, the State would recommend ten years imprisonment for the first degree robbery charge and five years imprisonment for the second degree robbery charge (Plea Tr. 7). The prosecutor also stated that the State would not make any recommendation about whether the sentences would be concurrent or consecutive and would not oppose Mr. Barmore receiving a suspended imposition of sentence or sentencing under the 120-day callback provision (Plea Tr. 7). The plea court then entered a finding that there was a factual basis to support Mr. Barmore's pleas of guilty to all charges and accepted his plea (Plea Tr. 10-11).

Roughly two and one-half months later, on January 15, 1999, the sentencing court ordered Mr. Barmore to complete a 5-year term of probation and suspended imposition of sentence (P.C.R.L.F. 22-24; Sent Tr. 19-21). At that time, the sentencing court advised Mr. Barmore that he could be sentenced to life imprisonment for the robbery charges (Sent. Tr. 17). On March 13, 2000, the sentencing court revoked Mr. Barmore's

probation and sentenced him to concurrent twenty and ten year terms of imprisonment in the Missouri Department of Corrections (P.C.R.L.F. 25-26).

Mr. Barmore timely filed a Motion for Post-conviction Relief pursuant to Supreme Court Rule 24.035 on June 7, 2000 (P.C.R.L.F. 30-35). In his 24.035 motion, Mr. Barmore averred that his plea was unknowing and unintelligent and hence involuntary because his attorney failed to tell him that after accepting a suspended imposition of sentence, the ten and five year sentencing caps he bargained for would not remain in effect (P.C.R.L.F. 43-45).

The motion court denied Mr. Barmore's request for an evidentiary hearing. The motion court relied on the plea transcript to find that Mr. Barmore was aware of the full range of punishment (P.C.R.L.F. 52). The motion court relied on the sentencing transcript to find that it had informed Mr. Barmore two and one-half months after his guilty plea that he would be subject to the full range of punishment if the motion court revoked his probation (P.C.R.L.F. 52). The sentencing court at no time informed Mr. Barmore that he could withdraw his plea because the bargain he had struck with the state for specific sentencing caps would no longer be in effect.

POINT RELIED ON

The motion court clearly erred in denying Mr. Barmore's Rule 24.035 post-conviction motion without an evidentiary hearing because a review of the record leaves a definite and firm impression that Mr. Barmore was entitled to a hearing since he pleaded facts, not refuted by the record, which if proved warranted relief, in that Mr. Barmore alleged that his attorney did not act as a reasonably competent attorney, in derogation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article One, Sections 10 and 18(a) of the Missouri Constitution because his attorney failed to inform him that if he accepted a suspended imposition of sentence, the sentencing caps he had agreed to as part of his plea bargain would no longer be valid and he could be sentenced under the full range of punishment. At a minimum, the motion court should have allowed Mr. Barmore the opportunity to withdraw his plea when it became clear he could be sentenced to terms of imprisonment greater than those he agreed to. The motion court's denial of an evidentiary hearing prejudiced Mr. Barmore by foreclosing him the opportunity to prove his claim. Had Mr. Barmore known that he could be sentenced under the full range of punishment if he accepted a suspended imposition of sentence, he would not have pleaded guilty but would have proceeded to trial.

Boyd v. State, 10 S.W.3d 597 (Mo.App., E.D. 2000);

Wilson v. State, 26 S.W.3d 191 (Mo. App. S.D. 2000);

Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997);

Missouri Constitution, Article I, Section 18(a);

United States Constitution Amendments 6 and 14;

Missouri Supreme Court Rules 24.02 and 24.035.

ARGUMENT

The motion court clearly erred in denying Mr. Barmore's Rule 24.035 post-conviction motion without an evidentiary hearing because a review of the record leaves a definite and firm impression that Mr. Barmore was entitled to a hearing since he pleaded facts, not refuted by the record, which if proved warranted relief, in that Mr. Barmore alleged that his attorney did not act as a reasonably competent attorney, in derogation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article One, Sections 10 and 18(a) of the Missouri Constitution because his attorney failed to inform him that if he accepted a suspended imposition of sentence, the sentencing caps he had agreed to as part of his plea bargain would no longer be valid and he could be sentenced under the full range of punishment. At a minimum, the motion court should have allowed Mr. Barmore the opportunity to withdraw his plea when it became clear he could be sentenced to terms of imprisonment greater than those he agreed to. The motion court's denial of an evidentiary hearing prejudiced Mr. Barmore by foreclosing him the opportunity to prove his claim. Had Mr. Barmore known that he could be sentenced under the full range of punishment if he accepted a suspended imposition of sentence, he would not have pleaded guilty but would have proceeded to trial.

Mr. Barmore filed a timely *pro se* motion to vacate, set aside or correct the judgment or sentence (P.C.R.L.F. 30-35). The motion court appointed counsel, who timely filed an amended motion (P.C.R.L.F. 36, 37-39, 40-47). In it, Mr. Barmore

alleged, in part, that his plea was unknowing and unintelligent and hence involuntary because his attorney failed to explain probation procedures to him and thereby allowed him to believe that after accepting a suspended imposition of sentence, the ten and five year sentencing caps he bargained for would remain in effect (P.C.R.L.F. 43-45).

The motion court, in denying Mr. Barmore's request for an evidentiary hearing, relied on the plea transcript to find that Mr. Barmore was aware of the full range of punishment and the sentencing transcript to find that the motion court informed Mr. Barmore two and one-half months after his guilty plea that he would be subject to the full range of punishment if the motion court revoked his probation (P.C.R.L.F. 52). The motion court erred in denying Mr. Barmore's motion without an evidentiary hearing because Mr. Barmore alleged facts, not conclusions, which were not refuted by the record, and, if true, would have entitled him to relief.

Rule 24.035(g) requires that an evidentiary hearing be held when the motion pleads facts, not conclusions, warranting relief, which are not refuted by the record, and the matters complained of resulted in prejudice to the movant. Burroughs v. State, 773 S.W.2d 167, 169 (Mo.App. 1989). Appellate review is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Id. Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been made. Id.; Richardson v. State, 719 S.W.2d 912, 915 (Mo.App. 1986).

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the Constitution of the United States and by Article I, Sections 10 and 18(a) of the

Missouri Constitution and is a fundamental right mandated to state defendants through the Fourteenth Amendment. Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 782 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932). Failure to provide effective assistance of counsel is a fundamental constitutional error that undermines the entire adversarial process. Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir. 1976), cert denied, 429 U.S. 868 (1976).

To establish that a conviction must be set aside due to ineffective assistance of counsel, a movant must show that counsel did not demonstrate the customary skill and diligence that a reasonably competent attorney would display when rendering similar services under the existing circumstances, and that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Seales v. State, 580 S.W.2d 733, 736-737 (Mo.banc 1979). The Strickland test is applicable to cases in which guilty pleas are entered. In order to satisfy the second Strickland requirement, the appellant must show that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985); Kline v. State, 704 S.W.2d 721 (Mo.App. 1976).

After entry of a guilty plea, the effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. Porter v. State, 678 S.W.2d 2, 3 (Mo.App. 1984); Walker v. State, 698 S.W.2d 871, 874 (Mo.App. 1985). It is well-established that a plea of guilty is not made voluntarily if it is induced by fraud or mistake, misapprehension or fear, persuasion or the holding out of hopes which prove to be false or ill-founded. Drew v. State, 436 S.W.2d 727, 799 (Mo. 1969); Moore v. State,

488 S.W.2d 266 (Mo.App. 1972). Here, Mr. Barmore's guilty plea was unknowing and unintelligent because it was induced by the holding out of hopes which proved to be false or ill-founded and was based on a mistaken belief.

Mr. Barmore alleged that:

> Movant's guilty plea was involuntary, unknowing, and unintelligent, in that movant's attorney did not explain probation procedures to movant. Movant did not know at the time of his plea that if he violated his probation he could be sentenced under the full range of punishment for each count. Movant's plea bargain, and the state's recommendation, was for the minimum on each count. Specifically, if movant had known at the time of his plea that if the court revoked his probation, he could be sentenced under the full range of punishment for each count, he would not have pled guilty. A reasonable attorney under similar circumstances would [have] explained these salient facts to movant so he could make an informed decision about whether to enter a plea. But for plea counsel's silence about the range of punishment if his client ['s probation was] revoked, movant would not have pled [guilty] but would have insisted on going to trial.
>
> Movant's rights to due process of law, effective assistance of counsel and equal protection of law, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution were thus violated because movant's guilty plea was not knowing or voluntary.

(P.C.R.L.F. 43).

The motion court denied Mr. Barmore's claim without an evidentiary hearing (P.C.R.L.F. 50-52). In its findings, the motion court concluded that:

> [Mr. Barmore] ... claims that at the time of his plea he was not aware that if he violated his probation, he could be sentenced under the full range of punishment on each count. On the date of [Mr. Barmore's] guilty plea, the full range of punishment was explained to him by the prosecutor. [Mr. Barmore] indicated that he understood that the range of punishment (guilty plea transcript p.5, line 2-11). Further, when [Mr. Barmore] was granted a suspended imposition of sentence, following a presentence investigation, the court explicitly told [Mr. Barmore] that he could receive life in prison if he violated the terms of his probation (sentencing transcript p. 19, line 3-9). [Mr. Barmore] never expressed any confusion on that point, nor did he seek to withdraw his plea of guilty. The files and records of this case conclusively show that [Mr. Barmore] is entitled to no relief on his claim. Accordingly, this claim is DENIED without an evidentiary hearing.

(P.C.R.L.F. 52).

When considering whether a defendant pleaded guilty on a mistaken belief about his plea agreement and sentencing, the test is whether a reasonable basis exists in the

record for such a belief. Brown v. Gammon, 947 S.W.2d 437, 440-441 (Mo. App. W.D. 1997). Here, numbered paragraph 15 in Mr. Barmore's petition to enter a plea agreement states:

> The plea of guilty which I desire to make in this case is the result of negotiations made by me through my attorney with the attorney for the State. The agreement reached by the parties is that if I plead guilty, the Court will sentence me as follows: robbery-1st 10 years; robbery 2nd 5 years; no position concurrent or consecutive; no position SIS or SES or 120 day callback; if probation 90 day shock; restitution; GED; 150 hrs. community service.

(P.C.R.L.F. 13). The petition to enter a guilty plea, signed by appellant, stated that if appellant pled guilty, the court would sentence him to ten years imprisonment for the robbery in the first degree charge and five years imprisonment for the robbery in the second degree charge (P.C.R.L.F. 13). The State also agreed that it would make no recommendation to the court as to whether appellant would receive a suspended imposition of sentence, a suspended execution of sentence or probation (P.C.R.L.F. 13).

Moreover, numbered paragraph 17 in Mr. Barmore's petition to enter a plea agreement states:

> If there is no plea agreement, I know that the sentence I will receive is solely a matter within the control of the Judge. I hope to receive leniency, but I am prepared to accept

any punishment permitted by law which the Court sees fit to impose.

(P.C.R.L.F. 14). The plea court signed Mr. Barmore's petition to enter a plea agreement, giving it the full force of the state and making it a reasonable document on which to rely (P.C.R.L.F. 21).

During the plea hearing, the following was elicited from appellant while he was under oath:

> [Prosecutor]: ... Sir, Count I, robbery in the first degree, is a Class A felony. The range of punishment for a class A felony is ten to thirty years in the Missouri Department of Corrections or life imprisonment. Count II is the Class B felony. The range of punishment for a Class B felony is five to fifteen years in the Missouri Department of corrections.
>
> Q. (By the Court): Do you understand the range of penalty?
>
> A. Yes.

(Plea Tr. 5).

It was not until the sentencing hearing that appellant was warned that if he violated his probation, he could be sentenced under the full range of punishment:

> [By the court]: ... You could have been sentenced to thirty years in prison for robbery. Thirty years in prison - - now, at your age, thirty years is an eternity, and if I do not sentence you to today, then I will still have the opportunity, if you violate your probation, to sentence you to thirty years in prison.

[By the prosecutor]: I'm sorry, the maximum is life.

[By the Court]: Thirty years or life, exactly - - I'm sorry. It's written out in this, ten to thirty years but it is life, ...

(Sent. Tr. 17).

[By the court]: ... There are going to be a number of conditions imposed on you, because I am going to put you on probation, but you are going to be under strict supervision, and if there is any violation of any one of those, you're going to be required to come back into court and be sentenced, and I have instructed you that that may be life in prison.

(Sent. Tr. 19).

Nothing in the plea transcript refutes Mr. Barmore's mistaken belief that he would not receive more than a ten year sentence on the first degree robbery charge and more than a five year sentence on the second degree robbery charge (Plea Tr. 2-11). Nothing states that the ten and five year sentencing caps Mr. Barmore had bargained for would lose effect if the sentencing court issued a suspended imposition of sentence (Plea Tr. 2-11).

"When representing a client regarding a guilty plea, counsel has an obligation to provide the client with an accurate account of the possible range of punishment for the offenses for which the client is pleading." Wilson v. State, 26 S.W.3d 191, 195 (Mo. App. S.D. 2000). The Wilson court was addressing being sentenced as a prior and persistent offender, but the situation is analogous to the present case. Mr. Barmore could not have freely, voluntarily and intelligently entered his guilty plea because his plea

counsel did not educate him about the significance of receiving a suspended imposition of sentence. Here the significance is that Mr. Barmore's bargain for a cap on the length of the sentence he could receive in the Missouri Department of Corrections would no longer be valid. This is a matter which plea counsel should have consulted Mr. Barmore. See, Buckner v. State, 995 S.W.2d 47, 49-50 (Mo. App. W.D. 1999).

In Boyd v. State, 10 S.W.3d 597 (Mo. App. E.D. 2000) the court reversed and remanded for an evidentiary hearing when it was alleged that the defendant was not informed at the time he entered his plea of guilty of the consequences of his later actions. Id. at 600. There, the court found that:

> It is also true that both the court and the prosecutor warned [the defendant] of the consequences if he failed to appear. However, these consequences were only discussed with [the defendant] after the court accepted the plea. A trial court or the prosecutor certainly may impose such conditions as part of the plea bargain as a condition of accepting the plea. However, once the plea has been accepted, such conditions may not be imposed without giving the defendant an opportunity to withdraw his plea.

Id. (emphasis added) (citations omitted). See also Coates v. State, 939 S.W.2d 912, 915 (Mo. banc 1997) (stating that "[o]nly by treating the pleadings as amended to allege the highly improbable fact that movant would have accepted a prison sentence over a probation would be he be entitled to an evidentiary hearing"); Benford v. State, 54 S.W.3d 728, 733 (Mo. App., S.D. 2001); Holland v. State, 954 S.W.2d 660, 662 (Mo.

App., E.D. 1997) (nothing in the record that showed defendant knew what sentence would be if the court revoked probation).

Here, the record does not refute Mr. Barmore's claim that he was not told until after he entered his plea of guilty that he could be sentenced to the full range of punishment. Applying the holding in Boyd to the present case, the motion court clearly erred in denying Mr. Barmore's claim without an evidentiary hearing. Thus, like Boyd, this case should be remanded to provide Mr. Barmore an opportunity to determine the merits of his claim.

At the least, when the sentencing court brought up the subject of sentencing Mr. Barmore if he violated his probation, the sentencing court should have afforded Mr. Barmore the opportunity to withdraw his plea. Brown v. Gammon, 947 S.W.2d at 441. By failing to do so the motion court violated Rule 24.02(d)(4) and denied Mr. Barmore's rights to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Missouri Supreme Court Rule 24.02(d) provides in pertinent part:

> 4. . . . If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated by the

plea agreement.

This rule is intended to ensure that a defendant's guilty plea is voluntary. Blackford v. State, 884 S.W.2d 98, 100 (Mo. App., W.D. 1994). "For a system of criminal justice strongly to encourage a defendant to believe that a certain sentence will follow the abandonment of his constitutional rights and yet impose an entirely different sentence seems manifestly unfair". Schellert v. State, 569 S.W.2d 735, 738 (Mo. banc 1978) (citations omitted). The defendant should not be entrapped and he should be permitted to withdraw a plea which was induced by the promise of an agreement which the trial court chooses not to follow. Id. It is well-settled that if the defendant has been misled or induced to plead guilty by fraud, mistake, misapprehension, fear, coercion or promises, the defendant's plea of guilty is involuntary and should be withdrawn. Tillock v. State, 711 S.W.2d 203, 205 (Mo. App., S.D. 1986). The trial court's failure to afford the defendant the opportunity to withdraw his plea in compliance with Rule 24.02(d)(4) constitutes reversible error. See State v. Simpson, 836 S.W.2d 75, 80 (Mo. App., S.D. 1992); Rule 24.02(d)(4).

Here, the record does not refute Mr. Barmore's claim that he was not informed at the time he entered his plea of guilty that if he accepted a suspended imposition of sentence he could be sentenced under the full range of punishment rather than the sentences that he and the State had mutually agreed upon.

Compliance with Rule 24.02 is not discretionary; it is mandatory. Dean v. State, 901 S.W.2d 323 (Mo. App., W.D. 1995); State v. Simpson, supra; Rule 24.02(d)(4). The

plea court is required to do as Rule 24.02 requires, whether or not the criminal defendant requests to withdraw his guilty plea. Id.

The motion court's findings are clearly erroneous. The amended motion and record of the case conclusively show that Mr. Barmore is entitled to relief. The trial court violated Rule 24.02(d)(4) and denied Barmore's rights to due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must set aside the motion court's judgment and remand for an evidentiary hearing.

CONCLUSION

WHEREFORE, for the forgoing reasons, appellant Scott Barmore prays that this honorable Court reverse the motion court's denial of his Rule 24.035 Motion and remand this cause for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 28th day of April 2003, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed/delivered postage prepaid to the office of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

_____
Raymund J. Capelovitch

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 4,603 words, including the cover page, signature block, and certificates of service and of compliance. In addition, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee Anti-Virus software and found virus-free.

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APPENDIX

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